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No. 09-359

Supreme Court, U.S.
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In The

Supreme Court of the United States

NANO MALDONADO, AN INDIVIDUAL,

Petitioner,

v.

RANDELL IWASAKI, IN HIS CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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SUMMARY OF THE CASE

In the early 1990's petitioner Maldonado bought a parcel of land adjacent to an interstate highway. The land was improved with a warehouse and billboard in 1956.

Maldonado's billboard structure is located within a zone subject to regulation under the California Outdoor Advertising Act ("Act"). Consistent with the Highway Beautification Act enacted by Congress,[1] the California Act has always exempted billboards from regulation so long as the owners self-censor their billboard publications to messages advertising "goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed." Bus. & Prof. Code § 5442(c); App. 143.

Until a recent amendment, all other publications (including offsite noncommercial advertisements) were prohibited. Bus. & Prof. Code § 5440; App. 143. Violations are chargeable as a public nuisance or misdemeanor. Bus. & Prof. Code §§ 5461 and 5464; App. 144.

Despite the ban, the owners of other billboard structures built prior to the enactment of the modern version of the Act in 1967 are allowed to publish

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[1] See 23 U.S.C. § 131(c)(3) and 23 F.C.R. §§ 750.105 and 750.709. The Highway Beautification Act does not preempt state law, it merely provides a "carrot" (or "stick"). *National Advertising Co. v. City of Ashland, Oregon*, 678 F.2d 106, 108-109 (CA9 1982) (Kennedy, J.).

offsite commercial advertising within the same zone as Maldonado. App. 53.

Maldonado, however, was cited, charged, and convicted of maintaining a public nuisance for publishing advertisements for the Stanford University football team and four local businesses between 1993 and 1996. *People ex rel. Dept. of Transportation v. Maldonado* ("*Maldonado I*"), 86 Cal.App.4th 1225, 1228 (2001). The state court issued a permanent injunction forbidding Maldonado from publishing any advertisements that do not exclusively relate to goods and services sold on the premises, or activities conducted thereon. *Id.* at 1233-1235; see also, *Maldonado v. Morales* ("*Maldonado IV*"), 556 F.3d 1037, 1041 (CA9 2009) (reciting injunction language); App. 4.

Maldonado thereafter suffered multiple contempt convictions in state court for violating the injunction. The last conviction was for publishing a Habitat for Humanity advertisement stating, "With your help we're Building Community on the Peninsula." *Maldonado v. Kempton* ("*Maldonado III*"), 422 F.Supp.2d 1169, 1170-1171 (N.D. Cal. 2006); App. 68. During the same proceeding, Maldonado was acquitted of contempt for publishing the messages, "In God We Trust" "We Pray For World Peace" and "Help Stop Terrorism." *Ibid.*

Although Respondent Iwasaki ("the Director") argues "there was no showing that any noncommercial speech had ever been impermissibly denied"

(Opp. 4), the Habitat for Humanity conviction certainly belies that assertion and the District Court expressly ruled that the other messages for which Maldonado was charged "unquestionably contained non-commercial speech" and that "the confusion surrounding the issue bolsters plaintiff's claim that he feels 'chilled' from displaying non-commercial messages on his billboard." *Maldonado III*, 422 F.Supp.2d 1169, 1175; App. 80.

The District Court ruled the Act was facially unconstitutional (*Maldonado III*), and the Director did not appeal that ruling. Instead, the State amended the Act as follows:

> Notwithstanding any other provision of this chapter, the director may not regulate non-commercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter.

Bus. & Prof. Code § 5275.

The dispute now, broadly stated, is whether that amendment cures the constitutional infirmities, or simply imposes new constitutional infirmities.

ARGUMENT

I. THIS COURT SHOULD REVIEW WHETHER THE COMMERCIAL-NONCOMMERCIAL DISTINCTION IS SO VAGUE, OVERBROAD, AND ARBITRARY THAT IT VIOLATES DUE PROCESS AND ABRIDGES THE FREEDOM OF SPEECH AND PRESS

Maldonado's brief on the merits will demonstrate that the statutory phrase "noncommercial, protected speech" and all of the judicially-crafted definitions of "commercial speech" are vague, overbroad, or arbitrary.

"Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause. . . ." *U.S. v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 1845 (2008). In the First Amendment context, facial challenges are permitted. *Ibid.*

The vagueness doctrine addresses three main concerns:

> 1. Fair Notice: "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."
>
> 2. Arbitrary Enforcement: "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis,

> with the attendant dangers of arbitrary and discriminatory application."
>
> 3. Chill of Free Expression: "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (quote marks and citations omitted).

The vagueness doctrine is applicable to both civil and criminal statutes. *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). However, "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily on civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948).

A related, but distinct, concept is the First Amendment doctrine of overbreadth. "[A] statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 128 S.Ct. 1830, 1838. The overbreadth must be substantial "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.*

Even a "widely used and well understood word" can be *both* vague and overbroad if people must guess at its contextual meaning and if its common meaning

includes protected expression. *Coates v. City of Cincinnati*, 402 U.S. 611, 612-614 (1971).

The terms "commercial" and "noncommercial" are widely used, but the distinction is "by no means clear" for a *legal categorization* of expression. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423, n. 19 (1993); accord, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 536-539 (1981) (Brennan, J., concurring in judgment) (discussing issue and providing thought-provoking hypotheticals); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) ("the precise bounds of the category" is "subject to doubt"); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in judgment) ("the borders of the commercial speech category are not nearly as clear as the Court has assumed").

The question must be asked: If making the commercial-noncommercial distinction is "by no means clear" to the learned Justices of the United States Supreme Court, how is "the person of ordinary intelligence" and no legal training supposed to determine whether any particular message constitutes commercial or noncommercial speech? That question is particularly important here because the Act has criminal penalties.

This Court has used six distinct approaches to categorizing commercial speech since the commercial speech doctrine sprang out of nowhere in the overruled case of *Valentine v. Chrestensen*, 316 U.S. 52

(1943). Pet. 9-26. Two other novel approaches have been utilized by the Seventh Circuit and California Supreme Court. Pet. 29-31. Surely there is a compelling need to settle the law.

Although no circuit court has had the audacity to rule that the standards articulated by this Court are too vague or overbroad, it certainly cannot be denied that there is a circuit split as to *which* standard to apply. Pet. 28-29.

Maldonado is subject to both the Ninth Circuit and California approaches. Pet. 31. The Director argues that *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 960 (2002) is not applicable. Opp. 21. But the Director cites no legal authority to undermine *U.D. Registry, Inc. v. State*, 144 Cal.App.4th 405, 420 (2006) which held "there is no single bright line test for defining commercial speech." *U.D.* at 421 paraphrasing *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1381, n. 7 (2003). Nor does the Director disclose which approach he contends California *does* apply. If it is the "Economic Interests" Approach adopted by California's intermediate appellate courts prior to *Nike* (see, Pet. 30), a conflict would still exist with the Ninth Circuit's "Dual Analysis" Approach.

The Director's string-citation to similar laws across America (Pet. 25) only accentuates the compelling need to grant review because it demonstrates the national importance of the issue. National advertisers are subject to multiple standards. Moreover, millions of small business owners with onsite signs

undoubtedly face the same censorship as Maldonado, but lack the gumption, stamina, and wherewithal to wage a legal battle all the way to this Court.

Finally, individual Members of this Court have repeatedly criticized existing doctrine. Pet. 26-27. Indeed, the Court itself has frequently criticized existing doctrine. Pet. 16, 18, 20-21, and 24; see especially, *Cincinnati*, 507 U.S. 410, 419-423 and n. 19 (suggesting the commercial-noncommercial distinction is vague, overbroad, and content-based); and see also, *id.* at n. 11 (suggesting that commercial speech should be "subjected to more exacting review" than *Central Hudson* provides).

On the merits, Maldonado will demonstrate that there is no textual or historical basis for the commercial speech doctrine and that its existence is wholly unnecessary to the legitimate and effective regulation of commerce. Secondarily, he will demonstrate that if the distinction must remain, the least objectionable and most workable approach would be to limit the doctrine to false and misleading speech. See, Pet. 9-13 ("Common Sense" Approach) and *cf.*, Pet. 25-26 ("Special Care" Approach).

II. THIS COURT SHOULD REVIEW WHETHER *CINCINNATI* CONSTITUTES BINDING PRECEDENT IN THE CONTEXT OF BILLBOARDS

A. The Commercial-Noncommercial Distinction Fails the Fourth Prong of *Central Hudson*

This Court has already distinguished the commercial-noncommercial distinction discussed in Part III of *Cincinnati*, from the "offsite-onsite distinction" involving "disparate treatment of two types of commercial speech" discussed in Part IV of the *Metromedia* plurality opinion.[2] *Cincinnati*, 507 U.S. 425, n. 20. Speaking through Justice Stevens (who had joined Parts I through IV of *Metromedia*), this Court noted that the seven Justices who had approved the offsite-onsite distinction of commercial speech in *Metromedia* "did not say" the government could "*distinguish* between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns" because "[t]hat question was not presented in *Metromedia*. . . ." *Ibid.* (emphasis in original).

Indeed, a case is not authority for a point not considered. *R.A.V. v. City of St. Paul, Minnesota*, 505

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[2] As the Director notes (Opp. 25, n. 9), the Oregon Supreme Court did not even bother to *distinguish* the onsite-offsite distinction discussed in *Metromedia*; rather, it simply *invalidated* it under the Oregon Constitution. *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 Ore. 275, 292-299 (2006).

U.S. 377, 386, n. 5 (1992). And if statements in an opinion "go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. State of Virginia*, 19 U.S. 264, 399-400 (1821) (Marshall, C.J.).

One very recent case has attempted to distinguish *Cincinnati* on the basis of an evidentiary showing relevant to the issue of effectiveness. *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 225 (CA5 2009) (comparing paltry number of newsracks removed with large number of billboards removed). But in *Cincinnati* this Court *accepted* the argument under prong three of *Central Hudson* that every decrease in newsracks "necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape." *Cincinnati*, 507 U.S. 425, 418. It nevertheless invalidated the ordinance because under prong four the commercial-noncommercial criteria for removal (the means) had no logical nexus with increased safety and aesthetics (the ends). *Cincinnati*, 507 U.S. 425, 418 (commercial racks "were no more harmful"), and *id.* at 425-426 (commercial racks were "no greater an eyesore").

B. The Commercial-Noncommercial Distinction Is Content-Based

In Part IV of *Cincinnati* this Court held that the commercial-noncommercial distinction is content-based (and therefore not subject to "time, place, and manner" analysis). *Cincinnati*, 507 U.S. 410, 428-431.

The first Ninth Circuit case to analyze *Cincinnati* failed to heed this Court's ruling that the commercial-noncommercial distinction is content-based; this legal weed not only flourishes as the blooming law of the circuit, but has in this case, germinated and spread its precedent-resilient seed into equal protection and prior restraint doctrine. See Pet. 34-35 (discussing *Outdoor Systems, Inc. v. City of Mesa*, 997 F.3d 604 (CA9 1993) and its progeny) and Pet. 35-37 (discussing erroneous equal protection and prior restraint standards used in *Maldonado IV*).

The erroneous rulings in this case must be tended to before they take firm root in the largest circuit of the nation. The mistaken notion that the commercial-noncommercial distinction is content-neutral is particularly important to eradicate because "[t]he normal inquiry that [Supreme Court] doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring).

Here, as discussed below, the erroneous law of the circuit caused the panel below to apply the wrong level of scrutiny in its prior restraint and equal protection analysis.

1. Prior Restraint

Even as to defamatory or obscene speech, the government may not use the heavy hand of a

nuisance statute to declare certain categories of speech illegal, and then restrain future publications by way of an injunction enforced by the judicial contempt power. Pet. 36-37 (citing cases). Doing so "is the essence of censorship." *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

In *dicta* this Court has hinted "that traditional prior restraint doctrine may not apply" to commercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 571, n. 13 (1980). But later *dicta* indicated such content-based regulations of commercial speech must be based upon "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection" such as "the risk of fraud." *R.A.V.*, 505 U.S. 377, 388-389.

Here, the District Court analyzed the state court injunction under the intermediate scrutiny test articulated in *Central Hudson*. App. 43-45. The Ninth Circuit acknowledged that this Court has "not addressed" what standard should generally be applied when reviewing "an injunction regulating commercial speech." *Maldonado IV*, 556 F.3d 1037, 1047; App. 19-20. But since circuit precedent held the commercial-noncommercial distinction to be *content-neutral*, the panel below analyzed the state court injunction under the malleable "intermediate-intermediate" standard of scrutiny. *Ibid.* citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

Maldonado contends strict scrutiny should have been applied. Pet. 36-38.

2. Equal Protection

The Director argued below that the equal protection claim should be analyzed under rational basis scrutiny. App. 33 citing *People ex rel. Dept. of Transportation v. Desert Outdoor Advertising, Inc.*, 68 Cal.App.3d 440, 450 (1977); see also, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 907 (CA9 2007).

The Ninth Circuit and District Court both upheld the restrictions under intermediate scrutiny. *Maldonado IV*, 556 F.3d 1037, 1048; App. 20-22 (Ninth Circuit); App. 25-36 and 49-54 (District Court). They so ruled despite this Court's admonition that "[e]ven under the degree of scrutiny . . . applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 193-194 (1999).

Again, Maldonado contends that strict scrutiny should have been applied to the content-based commercial-noncommercial distinction. Pet. 36 (citing cases).

III. THIS COURT SHOULD REVIEW WHETHER EVIDENCE IS REQUIRED TO DEMONSTRATE THAT A COMMERCIAL-NONCOMMERCIAL DISTINCTION "MATERIALLY ADVANCES" SAFETY AND AESTHETIC INTERESTS IN THE CONTEXT OF BILLBOARDS

The Director cites *Rappa v. New Castle County*, 18 F.3d 1043, 1055 (CA3 1994) in opposition to Maldonado's third question presented. But *Rappa* does not stand for the proposition for which it is cited (*i.e.* that the *Metromedia* plurality is binding simply because Justice Stevens joined Parts I through IV). Rather, *Rappa* stands for the opposite point (*i.e.* that the mode of analysis of the *Metromedia* plurality is *not* binding). *Id.* at 1058 ("Simply stated, the plurality and the concurrence took such markedly different approaches to the San Diego ordinance that there is no common denominator between them."); see also, *id.* at 1060 ("neither the plurality nor the concurrence 'articulates a legal standard which, when applied, will *necessarily* produce results with which a majority of the Court from that case would agree' ").

Moreover, Justice Stevens' opinion in *Metromedia* did not imbue Justice White's plurality opinion with majority status because Justice Stevens did not concur in the judgment. *Cf.*, *O'Dell v. Netherland*, 521 U.S. 151, 160, 162 (1997) ("Justice White concurred in the judgment, providing the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment*.") (emphasis added); accord, Goodhart, *Determining the Ratio Decidendi of a Case*,

40 Yale L.J. 161, 182 (1930) ("The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.").

Finally, this Court should take note of a recent billboard case where, in contrast to Ninth Circuit precedent, summary judgment was denied due to lack of *evidence* of material advancement. *Interstate Outdoor Advertising v. Zoning Board of The Township of Cherry Hill*, ___ F.Supp.2d ___ (D.N.J. 2009); 2009 WL 4691393 (Dec. 7, 2009), citing *Bell v. Township of Stafford*, 110 N.J. 384 (1988).

CONCLUSION

Petitioner Maldonado has presented this Court with compelling reasons to review all three questions presented. The opposition papers merely underscore the point that the commercial speech doctrine in general, and the law of billboards in particular, are in need of major revision, or at least clarification.

Respectfully submitted,

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